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No. 83-180

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

JAMES G. WATT, et al., and the WALKER RIVER PAIUTE TRIBE OF NEVADA,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE WALKER RIVER PAIUTE TRIBE IN OPPOSITION

Yvonne T. Knight
Counsel of Record
Jeanne S. Whiteing
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Attorneys for Respondent
The Walker River Paiute Tribe

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QUESTION PRESENTED

Whether pursuant to the Act of March 2, 1899, 30 Stat. 990, 25 U.S.C. §§312-318, the Secretary of the Interior can require tribal consent as a precondition to the filing and processing of an application for a railroad right-of-way across tribal trust lands of the Walker River Paiute Tribe of Nevada.

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STATEMENT OF THE CASE

The issue in this case grows out of a decision by the Secretary of the Interior to reject an application by Southern Pacific Transportation Company for a right-of-way across lands held in trust for the Walker River Paiute Tribe of Nevada.1/ The application was rejected because it lacked tribal consent.

Southern Pacific filed the application on April 28, 1977 because a 1976 decision of the Ninth Circuit Court of Appeals held that Southern Pacific had never complied with applicable federal laws governing the acquisition of railroad rights-of-way

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1/ The Walker River Paiute Tribe of Nevada is the governing body of the Walker River Indian Reservation and is organized pursuant to § 16 of the Indian Reorganization Act, 25 U.S.C. §476.

across Indian lands and therefore the railroad was a trespasser on tribal and allotted lands [2] of the Walker River Indian Reservation. United States v. Southern Pacific Transportation Company, 543 F.2d 676 (9th Cir. 1976) (hereinafter Southern Pacific I). Pet. App. B ii.

The Superintendent for the Western Nevada Agency of the Bureau of Indian Affairs initially rejected the application because it lacked any evidence of tribal consent. [3] The Superintendant's

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2/ The right-of-way application at issue, however, involves only tribal trust lands and not allotted lands.

3/ Southern Pacific cited the Act of March 2, 1899, 30 Stat. 990, 25 U.S.C. §§ 312-318 (the 1899 Act), as the sole authority for the application. A supplemental response from the Superintendent informed Southern Pacific that the application should have been filed under the 1948 Indian Rights of Way Act, 62 Stat. 17, 25 U.S.C. § 323 et seq. (the 1948 Act), which expressly requires tribal consent for right-of-way grants.

decision was subsequently affirmed by the Assistant Area Director for the Phoenix Area Office of the Bureau of Indian Affairs, and by the Assistant Secretary of the Interior for Indian Affairs. Pet. App. B iii.

Southern Pacific sought review of the Secretary's decision in the district court for the District of Nevada claiming that tribal consent was not necessary for railroad right-of-way grants under the 1899 Act. The Walker River Paiute Tribe intervened as a party defendant, and argued, along with the United States, that tribal consent was required. Judgment was entered by the district court in favor of Southern Pacific on August 14, 1980, and amended on August 28, 1980. Pet. App. B iv. and v. The district court held that tribal consent

could not be a condition precedent to a railroad right-of-way grant pursuant to the 1899 Act.

On appeal, the Ninth Circuit reversed and held that "[t]he Secretary acted within his power in requiring by regulation that tribal consent be obtained for the acquisition of rights-of-way pursuant to the 1899 Act, 25 U.S.C. § 312 (1976)." Southern Pacific Transportation Co. v. Watt, 700 F.2d 550, 556 (9th Cir. 1983) (hereinafter Southern Pacific II). Southern Pacific seeks review of this decision.

SUMMARY OF ARGUMENT

The tribal consent precondition required by the Secretary for the right-of-way at issue is a longstanding, congressionally approved requirement which is rooted in and consistent with principles

governing tribal sovereignty and with federal Indian policy. Both preserve and protect the right of Indian tribes to consent to and control the use of their lands.

The decision below gives full effect to these principles and policies and is consistent with decisions of this Court and the Courts of Appeals. There are no conflicts with decisions of any court.

The consent precondition is also in accord with the Secretary's broad authority under the 1899 Act, and is supported by provisions in the 1934 Indian Reorganization Act and the 1948 Indian Rights of Way Act which require tribal consent for all right-of-way grants and other dispositions of tribal land.

ARGUMENT

I. The Decision Below Gives Effect to Longstanding, Congressionally Approved Regulations Governing Rights of Way Across Tribal Land.

Tribal consent has been a part of the Secretary of the Interior's right of way regulations since at least 1928 - a period of 55 years. The 1928 regulations specifically require tribal consent for railroad rights-of-way. Section 79 of the regulations states:

> Where tribal lands are involved, all railroad and other right-of-way applications of more than ordinary importance should be presented to the tribe in general council assembled. A record of the proceedings shall be kept and a duly authenticated copy of such minutes should be attached. Except in the case of railroads the approval of the Secretary of the Interior may be given in his discretion, even though no amicable settlement has been reached with the Indians. However, it is required that every effort be made to bring about an amicable agreement whenever reasonably possible. (Emphasis added).

Regulations of the U.S. Department of Interior Concerning Rights of Way Over Indian Lands, U.S. Govt. Printing Office, 1929. Subsequently, regulations in 1938 provided:

> 256.83 Consent of allottees or Tribe.... Where tribal lands are involved, belonging to a tribe which is organized under the Act of June 18, 1934 ..., all right-of-way applications must be presented to the tribal council or other authorized representative body; and, in the case of unorganized tribes, all railroad rights-of-way and others of more than ordinary importance, should likewise be thus submitted to the council or representative body of the tribe. A record of the proceedings should be kept and a duly authenticated copy attached to the schedule.

25 C.F.R. §256.83 (1939-40), 3 Fed. Reg. 984, 985 (May 24, 1938).[4/] The consent

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4/ Southern Pacific's assertion that the consent requirement was first promulgated in 1951 (Petition at 33, n.11) is incorrect. The 1951 regulations amended the 1938 regulations and were intended to implement the 1948 Act. Ignoring the earlier regulations, Southern Pacific

provision has appeared in all subsequent regulations governing rights-of-way. See 25 C.F.R. §256.3(a) (1951) (the 1951 regulations); and 25 C.F.R. §161.3(a), redesignated 25 C.F.R. §169.3(a) (1982).

(footnote 4 contined) contends that the tribal consent requirement applies only to grants under the 1948 Act. It points to the reference in section 256.3(c) of the 1951 regulations that the 1948 Act is the authority for the consent provision. But section 256.3(c) applies only to allotted lands, not tribal lands. Moreover, the 1951 regulations recite the 1948 Act as authority for all sections, including section 256.23 which implements the specific provisions of the 1899 Act.

Southern Pacific also relies on the statement in the current regulations, 25 C.F.R. § 169.23, that railroad rights-of-way granted under the 1899 Act are subject to "pertinent sections of this Part 169," and argues that tribal consent is not one of the pertinent sections. But the present regulations contain provisions dealing with other existing special right-of-way statutes, and these provisions would not be pertinent to railroad rights-of-way. See, e.g., §169.25 (oil and gas pipeline); §169.26 (telephone and telegraph lines) and §169.28 (public highways).

Congress has twice expressly approved the tribal consent provision in the regulations. In 1967, a House Committee recommended against proposed regulations, 32 Fed. Reg. 5512 (1967), which would have eliminated the consent requirement for rights-of-way across tribal lands of non-IRA tribes. The House Committee investigated the matter and concluded that:

> ... the Secretary's proposal for granting rights-of-way over tribal land without the consent of the tribe which owns it violates property rights, democratic principles, and the pattern of modern Indian legislation.
>
> The committee believes that the Secretary's assertion of power to act in disregard of his own regulation and issue rights-of-way over lands of tribes that have withheld their consent to such grants is contrary to law, as well as to good government, and should not be entertained.

H. Rep. No 91-78, 91st Cong., 1st Sess. 3 (1967). The Committee cited "one of the oldest principles of jurisprudence in

America - that Indian tribes should not be deprived of rights in their land without their consent." Id. at 17.

In 1976, Congress repealed a 1926 act which authorized condemnation of Pueblo tribal lands and made applicable to the Pueblos the 1899 Act, the 1948 Act and other special rights of way acts. Act of Sept. 17, 1976, 90 Stat. 1275, 25 U.S.C. §322. See Plains Electric Generation and Transmission Cooperative, Inc., v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976). In so doing, Congress authorized the Pueblo tribes to consent to right-of-way grants across their lands, thereby placing them "in the same position ... as other federally recognized Indian tribes." Conf. Rep. No. 94-1439, 94th Cong. 2d Sess. 3 (1976). The necessity for this was that:

> ... the 1926 Act denies the Pueblos the right of consent in considering applications for rights-of-way across their lands for whatever purpose. On the other hand, those tribes that organized constitutional governments pursuant to the Act of June 18, 1934 (48 Stat. 987), clearly, were provided the right of consent in considering rights-of-way applications. Moreover, the balance of federally recognized tribes have been granted the privilege of consent through Secretarial regulations.

Id. Obviously, Congress would not have repealed the 1926 condemnation statute on the one hand, and made the 1899 Act applicable on the other hand, unless it believed that Pueblo consent was necessary for grants under the 1899 Act.

In reenacting the right-of-way statutes in 1976, the above legislative history shows that Congress explicitly approved the Secretary's regulations which contained a tribal consent requirement for right-of-way grants including those made pursuant to the

1899 Act. See, United States v. Sheffield Board of Commissioners, 435 U.S. 110, 134-35 (1978); Helvering v. Reynolds Co., 306 U.S. 110, 116 (1939); Helvering v. Winmill, 305 U.S. 79, 83 (1938). Such approval also confirms the Secretary's authority to require tribal consent for all types of right-of-way grants for all tribes whether IRA or non-IRA. See e.g., Morton v. Ruiz, 415 U.S. 199, 214, 229-30 (1974); Vigil v. Andrus, 667 F.2d 931, 934-35 (10th Cir. 1982). 5/

5/ Congress' longstanding acquiescence in the Secretary's regulatory scheme also evinces an implied delegation by Congress to the Secretary of the authority to establish tribal consent as a pre-condition. See, United States v. Midwest Oil Co., 236 U.S. 459, 472-75 (1915); Sioux Tribe of Indians v. U.S., 316 U.S. 317, 327 (1942); Southern Pacific I, supra at 686, 689.

The Secretary's regulatory scheme is fully consistent with current federal Indian policy of encouraging tribal self-sufficiency and economic development. See, New Mexico v. Mescalero Apache Tribe, ___ U.S. ___, 51 U.S.L.W. 4741, 4744 (June 24, 1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n.5 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 n.10 (1980). It is also consistent with the rule that federal Indian statutes and regulations must be "construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence." Ramah Navajo Sch. Bd. v. Bureau of Revenue, ___ U.S. ___, 73 L.Ed.2d 1174, 1175 (1982).

Southern Pacific argues that the federal policy of encouraging railroad

expansion in the late 1800's controls and divested tribes of the power to consent. The history of railroad expansion vis a vis Indian reservations does not bear this out, however, and in any case, the national interest in protecting tribal lands is paramount.[6/]

Until 1899, railroad right-of-way grants across tribal lands were authorized only by special acts of Congress. When self-executing railroad right-of-way grants across public lands were authorized in 1875, Indian reservations were expressly excepted. Act of March 3, 1875, 18 Stat.

6/ In right-of-way statutes prior to and after 1899, Congress apparently did not find tribal consent to be inconsistent with the promotion, growth and expansion of an interstate railroad system. See Act of August 5, 1882, 22 Stat. 299; Act of May 30, 1888, 25 Stat. 160; Act of May 8, 1890, 26 Stat. 102, Act of Feb. 18, 1895, 28 Stat. 665, all cited in Pet. at 56 n.36.

482, 43 U.S.C. § 938. See Southern Pacific I, supra at 687-89. 7/ Later, the 1899 Act authorized administrative grants of railroad rights-of-way across tribal lands to eliminate the need for special acts and to achieve uniformity, but in a manner which would "fully preserve and protect the rights and interests of Indians." H.R. Rep. No. 1896, 55th Cong., 3d Sess. 2 (1899). If railroad expansion had been paramount, Congress could have simply amended the 1875 Act to include Indian reservations rather than enacting a special statute protective of Indian lands.

7/ The 1875 Act was repealed in 1976, 90 Stat. 2793. Presently rights-of-way for public utility purposes including railroads can be acquired over public lands through a grant from the Secretary. See 43 U.S.C. §1761.

II. The Decision is Consistent With Decisions of this Court and the Courts of Appeal

Congress has always respected, and this Court has upheld, the right of Indians to consent to and control the use of their lands.[8] Thus this Court has required

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8/ This policy was articulated early in history in the Northwest Ordinance of 1787, ratified by the First Congress, 1 Stat. 50, 52:

> The utmost good faith shall always be observed toward the Indians. Their lands and property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed unless in just and lawful wars authorized by Congress ....

The policy is relied on in numerous Supreme Court decisions, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876); New York Indians (Fellows v. Deniston), 72 U.S. (5 Wall.) 761, 768 (1867); Wilson v. Omaha Indian Tribe, 442 U.S. 653, 665 (1979). See also, Prucha, American Indian Policy in the Formative Years (Harvard University Press, 1962), p. 40.

that any congressional intent to deprive a Tribe of its rights or interests in or over its land without its consent be clear and unequivocal. United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 353 (1941); United States v. Shoshone Tribe, 304 U.S. 111, 117-18 (1938); cf. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978). See also, Cohen, "Original Indian Title," 32 Minn. L.R. 28, 36-37 (1947).

Most recently this Court has stated that "[a] tribe's power to exclude non-members entirely or to condition their presence on the reservation is ... well established." New Mexico v. Mescalero Apache Tribe, supra 51 U.S.L.W. at 4743. See also Montana v. United States, 450 U.S. 544, 557 (1981). The power derives from the dual role of a tribe as a landowner and

a local government, see e.g., Merrion v. Jicarilla Apache Tribe, supra, 455 U.S. at 145 n.12, and includes the "sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business...." Id. The right to condition a right-of-way grant on the consent of a tribe is certainly in accordance with these principles. See Escondido Mutual Water Co. v. F.E.R.C., 692 F.2d 1223, 1231-1233 (9th Cir. 1982).

Southern Pacific suggests that there is a conflict in the circuits as to whether the 1899 Act is an eminent domain statute. See discussion infra at 24-26. However, as recognized by the court below, the purported conflict involves only dicta. Southern Pacific II, supra at 555 n.2.

In United States v. Ft. Smith & W.R. Co., 195 F. 211 (8th Cir. 1912), the statute involved was an eminent domain statute, 30 Stat. 1368, passed one day after the 1899 Act. At issue, was a right-of-way across individual allotted lands. In dictum, the Eighth Circuit compared the special act with certain provisions of the 1899 Act and stated that the 1899 Act also granted eminent domain power over tribal and allotted lands. But the Eighth Circuit obviously was not required to make, nor did it make, a careful analysis of the 1899 Act. If it had, it would have found that Congress passed the special act granting the Railroad condemnation power precisely because it believed that the 1899 Act did not grant such power. Furthermore, the

court would have discovered that the condemnation provisions of the 1899 Act it cites apply only to allotted lands. See section 3 of the Act, 25 U.S.C. §314.

The decision of the Tenth Circuit in Clarke v. Boysen, 39 F.2d 800 (10th Cir. 1930) likewise did not turn on whether the 1899 Act is an eminent domain statute. The Tenth Circuit did not independently analyze the 1899 Act, but simply cited and relied upon the erroneous findings of the Eighth Circuit in United States v. Ft. Smith & W.R. Co., supra.

III. Review is Otherwise Inappropriate

Southern Pacific raises additional questions regarding the authority of the Secretary to require tribal consent as a precondition for a railroad right-of-way. None of these issues warrant review.

A. Authority of the Secretary.

The tribal consent precondition is within the Secretary's authority. The 1899 Act on its face authorizes the Secretary to establish grant preconditions by regulation. Section 1 provides that a right-of-way:

> is hereby granted to any railroad company ... which shall comply with the provisions of this Act and such rules and regulations as may be prescribed thereunder. (Emphasis added).

This provision requires compliance with the act and administrative rules and regulations, and constitutes a grant of broad authority to the Secretary which by its terms contemplates regulations which go beyond the specific conditions enumerated in the Act. Thus tribal consent, although not specifically provided for in the 1899

Act, is authorized by the Act and has been required by the Secretary for grants under the Act since at least 1928.

It is by now a fundamental rule that substantial deference shall be given to the construction of a statute by the agency charged with its administration. Udall v. Tallman, 380 U.S. 1, 16 (1965). The standard for reviewing the agency's construction is whether it is reasonable. Id.

The Secretary's regulation requiring tribal consent as a grant precondition is entirely consistent with the purpose of the 1899 Act to allow administrative grants of railroad rights-of-way in a manner which would "fully preserve and protect the rights and interests of the Indians." H.R. Rep. No. 1896, supra at 2. The tribal consent regulation is a reasonable means of achieving this purpose. Indeed, as

Southern Pacific points out in its Petition at 31-33, the protective effect of a tribal consent requirement to administrative conveyances of tribal land prompted Congress to require consent for all such conveyances as part of section 16 of the IRA, 25 U.S.C. §476.

The consent provision is based on a long history of federal policies and legal principles which respect the right of Indians to control the use of their land, see discussion supra at 16-18 . These basic principles and policies, along with the purpose of the 1899 Act as set out in its terms and legislative history, provide the standards by which the Secretary exercises his authority. These standards govern many aspects of Indian affairs, see note 11 supra, and guard against any arbitrary action by the Secretary.

Southern Pacific argues that tribal consent is inconsistent with the 1899 Act because the 1899 Act is "in the nature of an eminent domain statute." Pet. at 40. But the specific language of the statute supports a different conclusion. On its face, the statute requires that the railroad comply with conditions in the Act, as well as the Secretary's rules and regulations in order for a right-of-way to issue. This is in contrast to the right-of-way granted to the Fort Smith and Western Railroad Company the day after the 1899 Act, where the Railroad was:

> invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Choctaw and Creek nations....

Section 1 of the Act of March 3, 1899, 30 Stat. 1368. It is also in contrast with

the earlier 1875 statute granting rights-of-way across public domain land. Section 1 of this Act provides that:

> ... a right of way through the public lands ... is hereby granted to any railroad company ... which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization ... to the extent of one hundred feet on each side of the control line of said road. ...

Section 1 of the Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §934 et seq. This language has been interpreted as a grant in praesenti, Southern Pacific I, supra at 691.

Congress obviously has not interpreted the 1899 Act as an eminent domain statute. In 1976, when it repealed the 1926 Pueblo lands railroad condemnation statute, and made the 1899 Act applicable, the purpose was to abolish condemnation of Pueblo lands. Act of Sept. 17, 1976, 90 Stat. 1275. See Hearings Before the

Subcommittee on Indian Affairs on S. 217, 94th Cong. 1st Sess. 4 (1975). It would have made no sense for Congress to repeal one railroad condemnation statute and in the same breath make another condemnation statute applicable. Thus Congress' interpretation of the 1899 Act rejects its characterization as an eminent domain statute, and supports the authority of the Secretary to require tribal consent.

B. Delegation

Southern Pacific also argues that requirement of tribal consent is an unconstitutional delegation of authority to Indian tribes. However, such delegation is fully consistent with this Court's decision in United States v. Mazurie, 419 U.S. 544 (1975). In Mazurie, the limitations on the power to delegate recognized in Panama Refining Co. v. Ryan, 293 U.S. 388 (1935),

were found to be "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." Id. at 556-57. The underlying rationale was that the delegatee tribe is required to afford due process to non-members under the Indian Civil Rights Act, 25 U.S.C. Section 1302, and that the Fifth Amendment may also be available to protect against arbitrary tribal action. Id. at 558 n.12. 9/ These are the standards by which the Tribe must exercise its authority. See Nance v. Environmental Protection Agency, 645 F.2d 701, 714-16 (9th Cir. 1981)(upholding the

9/ Of course, any issue of whether the Tribe's exercise of its delegated authority denied Southern Pacific any rights of due process is not properly before this Court. The only issue squarely presented by this case is whether the delegation itself is valid.

constitutionality of the delegation to tribes of the power to redesignate air quality even where it affects areas off the reservation). See R. Collins, "Implied limitations On The Jurisdiction of Indian Tribes" 54 Wash. L.R. 479, 523 (1979).

Thus to the extent that the Secretary's tribal consent regulation constitutes a delegation of his power to regulate railroad right-of-way grants, the delegation is valid under Mazurie. 10/ In fact, if

10/ In any case, it is arguable that the tribal consent regulation is a delegation of the Secretary's regulatory power under the 1899 Act. Rather, the regulations merely confirm that the Secretary in exercising his power under the 1899 Act will defer action until the Tribe exercises its inherent power as landowner and consents to a conveyance of its property. Statutes requiring consent of persons as a precondition to government action have generally been upheld against claims of unconstitutional delegation of power. The reasoning is that the power to

the delegation of power to regulate liquor is valid then the delegation of power to regulate the use of tribal lands is a fortiori valid because it is an even more basic attribute of tribal sovereignty. See Escondido Mutual Water Co. v. F.E.R.C, supra, 698 F.2d at 1233 n.6. 11/

(footnote 10 continued)consent to the exercise of regulatory authority is not power to regulate where the ultimate power to take action remains in the government. See generally, 1 Antieau, Municipal Corporation Law, Section 5.28 at 81-82 (1982). Here, the ultimate power to approve a railroad right of way remains in the Secretary. Southern Pacific II, supra, 700 F.2d at 556.

11/ The Secretary has delegated power to tribes in many other instances, even where no express legislative authorization exists. See e.g., 25 C.F.R. Part 11 establishing Courts of Indian Offenses and authorizing tribes in Section 11.1(e) to preempt certain regulations through the passage of inconsistent tribal ordinances; 25 C.F.R. §163.7 promulgated under 25 U.S.C. § 407, authorizing tribal consent to sale of timber on tribal lands; 43 C.F.R.

Southern Pacific and amici raise the spectre that tribes will unreasonably withhold their consent. However Congress has considered this argument on several occasions and has expressly rejected it as a reason for divesting tribes of the right to consent. In 1976 when Congress applied the 1899 Act and other right-of-way acts to the Pueblo tribes, see discussion supra at 10-11

(footnote 11 continued) §4.200 promulgated under various statutory authority authorizing tribal preemption of the Secretary's regulations establishing rules governing the settlement of trust estates of deceased Indians; and 25 C.F.R. § 211.28 promulgated under various Indian mineral leasing statutes authorizing tribes to supersede the Secretary's regulations governing leasing of tribal lands for mining purposes See also 40 C.F.R. §52.21(g)(1) promulgated under the Clean Air Act, 42 U.S.C. § 7401-7642, authorizing tribes to redesignate the air quality on their reservations from that already established by the Environmental Protection Agency. This authority was upheld in Nance v. Environmental Protection Agency, supra.

it responded to the argument by stating: "Should public necessity require rights-of-way across the lands of the Pueblo notwithstanding the lack of consent of the Pueblos, the Congress retains its authority to grant such rights-of-way." H.R. Rep. No. 94-800, 94th Cong., 2d Sess. 34 (1976) reprinted in 1976 U.S. Code Cong. & Ad. News 2370.

Again, in 1969, when Congress rejected proposed regulations which would have divested non-IRA tribes of the right to consent to rights-of-way, the argument was also rejected. The House Committee which reviewed the regulations recognized that "[t]here may be cases where overwhelming public necessity will justify the condemnation of rights-of-way over tribal Indian land despite the opposition of the Indian landowners." It nevertheless

believed that "involuntary disposal of the Indians' property rights ought not to be done by administrative action of the Interior Department." Instead, the Committee stated that such cases ought to be left to resolution by Congress. H.R. Rep. No. 91-78, supra at 9. Clearly Congress has never believed that the issue raised by Southern Pacific and amici warrants divesting tribes of the power to consent (or withhold consent) for rights-of-way across their lands.

IV. The Court's Judgment Can Also Be Sustained On Other Grounds

The Ninth Circuit's decision rests solely on construction of the 1899 Act, but it also may be sustained on other grounds. Both section 16 of the Indian Reorganization Act, 25 U.S.C. Section 476, and section 2 of the 1948 Indian Rights of Way

Act, 25 U.S.C. Section 324, require tribal consent for rights-of-way across Indian lands and would apply to the railroad right-of-way at issue.

Section 16 of the IRA empowers tribes organized under the Act "to prevent the sale, disposition, lease, or encumbrance of tribal lands ...." The right-of-way regulations issued by the Secretary in 1938 implement the tribal consent condition required by the IRA, 25 C.F.R. §256.83 (1st ed. 1939-40), and apply to railroad right-of-way grants across tribal lands as well as other dispositions of tribal lands.

When Congress enacted the 1948 Indian Rights of Way Act, it believed that IRA tribes already possessed the power to consent to dispositions of their land for rights-of-way under the various existing

special acts. See S. Rep. No. 823, 80th Cong., 2d Sess. (1948), reprinted in 1948 U.S. Code.Cong. & Adm. News 1033, 1036. Thus Congress sought to "preserve the powers" of IRA tribes to consent to right-of-way grants by expressly providing for such consent in the 1948 Act. See section 2 of the 1948 Act, 25 U.S.C. §324. 12/

Alternatively, the 1899 Act and all other special right-of-way statutes authorizing secretarial grants were implicitly amended in 1948 to require tribal consent when they were incorporated into the comprehensive and uniform scheme for granting rights-of-way contemplated by the 1948 Act. See, S. Rep. No. 823, supra. Congress specifically considered the

12/ See also discussion of the 1976 Pueblo Lands Act supra at 10-11, and H.R. Rep. No. 78, 91st Cong. 1st Sess. (1969) discussed supra at 9-10.

treatment of special right- of-way statutes in the 1948 Act's comprehensive scheme and decided to preserve them as parts of the scheme. 25 U.S.C. §326. It is reasonable to infer that the same Congress which so carefully preserved the power of IRA tribes to consent to rights-of-way, intended that this power apply to those special right-of-way acts preserved under the same act. In instances where Congress knowingly includes pre-existing statues as parts of an overall legislative scheme, implied amendment of such statutes is in keeping with Congress' intent in enacting the comprehensive scheme. 1A Sutherland, Statutory Construction, Section 22.13.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

Yvonne T. Knight
Counsel of Record
Jeanne S. Whiteing
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Attorneys for the Walker River
Paiute Tribe of Nevada

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